

July 27, 2005

Heather C. Mc Laughlin
City of Benicia
City Hall
250 East L Street
Benicia, CA 94510

Re: Your Request for Advice
Our File No. A-05-124

Dear Ms. Mc Laughlin:

This letter is in response to your request on behalf of Mayor Steve Messina and Councilmember Dan Smith for advice regarding conflict of interest provisions of the Political Reform Act (the “Act”).¹ This advice is based on the facts you have provided in your request. The Fair Political Practices Commission (“Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Section 83114.)

QUESTION

Can city council decisions regarding the joint use agreement in which the City will be considering whether or not it will provide maintenance of school district fields be segmented in order to allow Major Steve Messina and Councilmember Dan Smith to participate in the decisions?

CONCLUSION

Yes. The decisions regarding the joint use agreement may be segmented in order to allow Major Steve Messina and Councilmember Dan Smith to participate in the decisions regarding the City providing maintenance of the school district fields, if the requirements outlined below are met.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

In *McLaughlin* Advice Letter No. A-05-033 we provided you advice regarding whether or not there was a potential conflict of interest for Mayor Messina and Councilmember Smith when participating in governmental decisions involving the closing of schools in the Benicia Unified School District (the "District"). The potential conflict was related to their real property interests within 500 feet of the boundaries of certain schools. In that letter, we advised that both Mayor Messina and Councilmember Smith were prohibited from participating in those decisions because the financial effect of a decision is presumed to be material on property located within 500 feet of the property that is the subject of the governmental decision. (Section 87100, regulations 18704.2(a)(1), 18705.2 (a)(1).)

The facts presented in that letter were:

"Mayor Messina and Council Member Smith both own property within 500 feet of two elementary schools in the Benicia Unified School District (BUSD). You also state that the BUSD is considering budget cuts and other ways to help balance its budget. One possibility is to close one of the elementary schools in the district.

On February 9, 2005, the 7-11 committee (an appointed citizens committee to research, evaluate and recommend whether and which school's closure, is or is not in the district's best interest) recommended BUSD close Mills Elementary School. Mills is located within 500 feet of real property owned by Council Member Smith. On February 17, 2005, at the BUSD Board meeting, the Board received and discussed this recommendation and decided to go forward with the environmental review to close Mills Elementary School.

At the city council meeting on February 15, 2005, the city manager brought before the city council a discussion of a joint use agreement between the city and the BUSD. This agreement would offer city-provided maintenance and improvement of fields (at certain school sites) in return for expanded rights to use BUSD facilities and other consideration. The city manager's recommendation is to discuss options with the BUSD at a joint meeting between the school board and the city council on February 28, 2005.

At a school board meeting on February 17, 2005, one of the issues discussed by the Board was the need to determine whether the city will commit to leasing the closed school and if so, would the BUSD earn enough money from the lease to offset any fees it

pays the city for taking over the school field maintenance. *The city's decisions regarding how they will or will not help the BUSD, may affect the BUSD's decision whether or not to close an elementary school*, though Mills Elementary has been recommended. It is not yet determined which school will be closed.” (emphasis added.)

Thereafter, in the *McLaughlin* Advice Letter, No. A-05-061 you sought clarification as to whether or not Mayor Messina and Councilmember Smith may participate in decisions or negotiations regarding the “Joint Use Agreement” between the City and the District, where the City “is looking at possibly taking over the District’s field maintenance [on school properties] for consideration and/or leasing property from the District.” You again stated that the District was “considering closing one of its schools,” and that “the City may be interested in leasing the closed campus to use as a community center.” Again, two of the four District fields the City was proposing to maintain in the ‘Joint Use Agreement’ were “part of school properties that fall within 500 feet of either Messina’s or Smith’s real property.” You further stated that “[w]hether a ‘Joint Use Agreement’ is reached between the City and the District regarding the field maintenance and or lease may impact the [District’s] decision to close a school.”

Because the governmental decision in that question appeared to be interrelated to the governmental decision in question regarding the potential closure of a District school, and we previously advised that Mayor Messina and Councilmember Smith had a conflict of interest in that decision, as a result of that conflict we again advised that they also had a conflict of interest in participating in the decisions regarding the Joint Use Agreement, stating that “certain decisions are too interrelated to be considered separately, and in that event, a public official’s conflict on one decision will be disqualifying on the other. Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. (*Ball* Advice Letter, No. A-98-124.) Because this decision ‘may impact the BUSD’s decision to close a school,’ and Mayor Messina and Councilmember Smith may not participate in any decision involving the closing of schools, (see *McLaughlin, supra*) they may not participate in this decision.”

You now write seeking further clarification as to whether or not these decisions can be segmented under regulation 18709. You state that in order to accommodate a variety of issues such as budget, prioritization of work and workload management, the decision on a joint use agreement has been split into four separate decisions for each of the four fields instead of a single joint use agreement. This arrangement will allow the city and Benicia Unified School District to decide to enter into the joint use and maintenance agreement for one, two, three or all four fields.

The proposed agreements are not dependent on each other, and approval of one agreement does not require approval of any of the other agreements. Because there are two separate school properties, (one where Mayor Messina has a conflict and one where

Councilmember Smith has a conflict), of the five school properties involved, you ask if the council considers those two agreements first as two separate actions, would this allow Mayor Messina and Councilmember Smith to vote on the remaining agreements where they do not have a conflict.

Since your request in the current matter, you have indicated in a telephone conversation that the school district has now elected to close one of the schools, and the City's decision to maintain the fields on the various school properties (including the closed school) will no longer impact any decision regarding the closure of one of the schools.

The City now proposes to consider five separate decisions, one for each of the school properties, as to whether or not to enter an agreement to maintain the fields located on each of those school properties. The City may agree to maintain all or none of the fields, and a decision regarding any one field will not impact the decision on any of the remaining properties.

ANALYSIS

"Under certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest." (In re Owen (1976) 2 FPPC Ops. 77). Commission staff has consistently advised that an official may segregate a decision in which the official has a conflict of interest from other decisions in which he or she does not have a conflict of interest to allow participation by the official in one or several related decisions as long as the decisions are not too interrelated to be considered separately. The *Huffaker* Advice Letter, No. A-86-343 outlined a procedure to be followed in severing one decision from another.

In 2003, the Commission codified its advice, providing the conditions under which governmental decisions may be segmented and the method to follow to allow participation by officials who would otherwise have a conflict of interest. Regulation 18709 provides the rules for such "segmentation" of a governmental decision:

"(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

(2) The decision in which the official has a financial interest is segmented from the other decisions;

(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

(b) For purposes of this regulation, decisions are "inextricably interrelated" when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency's budget or to adopt, reject, or amend the general plan."

Because the decision to close one school has already been made by the school district, the decisions to enter the joint use agreement to maintain school field will no longer affect the closure of any school. Accordingly, Mayor Messina and Councilmember Smith no longer have a conflict based on the potential impact on the decision to close of one of the district schools. However, because the same school properties (including the property on which the closed school is located) are the subject of the governmental decisions, and Mayor Messina and Councilmember Smith each own property located within 500 feet of one the schools, they are each presumed to have a conflict of interest if the material financial effect² on their real property economic interest is reasonably foreseeable.

However, under the procedures set forth under regulation 18709, if the decision in which Mayor Messina has a financial interest and the decision in which Councilmember Smith has a financial interest are segmented into two separate decisions from the decisions concerning the remaining properties in which they do not have a financial interest, they may each be able to participate in the decisions concerning the remaining properties as long as all the requirements enumerated in regulation 18709 are met.

Under regulation 18709 (a)(3), the decision in which the official has a financial interest must be considered first. In this case, there are two officials who each have a

² Under the "one-penny rule" any financial effect, even "one penny" is presumed to be material on real property located within 500 feet of the subject of the governmental decision.

financial interest with respect to different segmented decisions. i.e. two of the five separate segmented decisions involve two different conflicted officials. Since only one decision may, by definition, be considered "first," in this circumstance, we would interpret "first" to mean "before that official may participate in any of the remaining segmented decisions in which he does not have a conflict of interest."

Accordingly, if you determine that the rules under regulation 18709 allowing segmentation of the decisions apply, the two decisions, in which either Mayor Messina or Councilmember Smith has a conflict of interest, must be considered before the remaining decisions in which neither have a conflict of interest. Neither official may participate in any of the segmented decisions until the decision in which he has a conflict of interest is reached. Therefore, the official who has a conflict in the first decision considered may participate in the remaining decision two through five while the official with a conflict in the second decision considered may not participate until decisions three through five.

In order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all the remaining decisions, we borrow from the procedure used under the legally required participation rule. The best random method of selecting which otherwise disqualified member should have the decision in which he has a conflict considered first is by lot. Other means of random selection that are impartial and equitable may also be used. Whatever method is used, both matters in which one of the two officials has a conflict must be considered in the random selection process and each must have an equal likelihood of being chosen first. (*Heisinger* Advice Letter, No. A-95-333; *Thorson* Advice Letter, No. A-04-238.)

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: William J. Lenkeit
Counsel, Legal Division

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